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RI'S CONVERSION THERAPY BAN PROTECTS LGBTQ YOUTH AND IT'S CONSTITUTIONAL

RI'S CONVERSION THERAPY BAN PROTECTS LGBTQ YOUTH AND IT'S CONSTITUTIONAL

August 9, 2017 Edward Fitzpatrick

Jared A. Goldstein, RWU law professor who teaches constitutional law and former U.S. Department of Justice attorney:

This year, Rhode Island joined eight other states in prohibiting “conversion therapy” — attempts to change a minor’s sexual orientation or gender identity through therapeutic techniques. Some organizations have argued that such bans might violate protections for freedom of speech and religion. As I testified before committees of the Rhode Island House and Senate, the ban protects

Rhode Island youth from a harmful practice and does not violate the Constitution.

The Rhode Island legislature has authority to protect minors against harmful practices such as conversion therapy. Rhode Island law already prohibits minors from getting tattoos, driving cars, and buying beer. The legislature was right to conclude that conversion therapy should be added to this list. Being LGBTQ is something to celebrate, not attempt to change. Conversion therapy is an immensely harmful practice. As the American Psychological Association and other professional organizations have concluded, attempts to change a person's sexual orientation or gender identity are doomed to fail and can lead to depression, self-hatred and suicide.

Opponents of the ban have argued that prohibiting conversion therapy might infringe on the free speech rights of health care professionals. As every court that has examined this question has correctly concluded, however, laws that prohibit conversion therapy do not violate free speech principles. See *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *King v. Governor of the State of New Jersey*, 767 F. 3d 216, 224 (3rd Cir. 2014); *Doe v. Governor of New Jersey*, 783 F.3d 150 (3rd Cir. 2015).

The prohibition on conversion therapy targets conduct, not speech. It prohibits *any* therapy that seeks to change a person's sexual orientation or gender identity, regardless of what technique is employed. Conversion therapy has sometimes included aversive conditioning techniques, involving the use of electric shocks or nausea-inducing drugs, while it has also included psychotherapy conducted through speech. Because the bill defines conversion therapy based on the *goal* of the therapy, not the technique, it bans any technique employed for the *purpose* of changing a person's sexual orientation, whether that technique involves drugs, surgery, shock treatment, or speech.

As a general matter, laws that target conduct do not infringe on free speech even though that conduct sometimes includes speech. For instance, armed robbery sometimes involves speech, like when a robber shouts “Give me your money or I’ll blow your brains out!” Laws against armed robbery are not invalid just because robbery sometimes is accomplished with words. The same principle is true for laws that prohibit employment discrimination. Sometimes discrimination can take the form of words, such as a sign that says “White Applicants Only,” but that does not mean that a ban on employment discrimination violates free speech.

In some ways, the ban on conversion therapy is akin to the state’s existing prohibition on providing tattoos to minors. That provision bans conduct — any tattooing of a minor — even though tattooing involves expression and sometimes involves words. If anything, the rationale for banning conversion therapy is much stronger than the rationale for banning minors from getting tattoos because the harms from conversion therapy are much more severe, while tattooing involves a much greater degree of protected self-expression.

Even if the proposed ban on conversion therapy were understood as targeting speech, it would still satisfy constitutional scrutiny. Laws targeting speech are valid if they are narrowly tailored to serving a compelling governmental purpose. The proposed ban undoubtedly serves a compelling interest — the protection of youth from a therapeutic practice that the American Psychological Association and other public health associations have determined cause devastating psychological harms without providing any benefits. The ban is narrowly tailored to advance that interest because it solely targets therapeutic techniques undertaken for the purpose of changing a person’s sexual orientation or gender identity.

The ban on conversion therapy can also be justified as a regulation of professional services. The state has substantial authority to regulate the practices of therapists because they are state-licensed professionals acting

within the confines of a professional relationship. Rhode Island has adopted numerous measures to regulate the provision of mental health counseling. Those rules restrict speech by requiring that therapists must conform to prevailing professional and ethical standards. These rules, like the ban on conversion therapy, protect Rhode Island residents from harmful or ineffective professional practices.

In addition to arguing that the ban might violate free speech principles, some suggested that the ban might infringe on the rights of religious practitioners to exercise religion. That concern, too, is unsupported. As the U.S. Supreme Court has held, a law that applies equally to everyone does not violate the Constitution just because it limits some people's ability to practice their religion. For instance, a state can validly prohibit everyone from using recreational drugs even though it might limit the ability of some people to practice a religion that involves drugs. In contrast, laws that specifically target religious practices — such as a ban on religious animal sacrifice — are constitutionally suspect and can only be upheld if the state has a compelling justification for the law. The ban on conversion therapy does not infringe on religious freedom because it applies equally to all licensed mental health providers. The legislature wisely chose not to include a religious exemption to the law because Rhode Island cannot allow harm to be inflicted on children in the state just because a therapist is motivated by a religious purpose.

In banning conversion therapy, Rhode Island took an important step in protecting LGBTQ youth. The Constitution does not stand in the way.